

108. (Unamended From Previous Version) A computer-readable medium according to Claim 102, wherein the process steps are computer-executable in a windowing environment.

REMARKS

Claims 74 to 75, 77 to 82, 84 to 89, 91 to 96, 98 to 103 and 105 to 108 are in the application. Claims 74, 81, 88, 95 and 102 are the independent claims herein. Favorable reconsideration and examination are respectfully requested.

By the Office Action, Claims 74 to 75, 77 to 82, 84 to 89, 91 to 96, 98 to 103 and 105 to 108 are rejected based on 35 U.S.C. § 102(a) over screen captures taken from Adobe Systems Inc.'s PhotoDeluxe, Version 2.0 software program (hereinafter referred to as the PhotoDeluxe program).

Along with the screen captures, the Office Action cites an Adobe Systems, Inc. press release dated August 11, 1997. Although it is not specifically addressed in the Office Action, it appears that the August 11, 1997 press release is being used by the Examiner to establish a date of availability for the PhotoDeluxe program prior to the filing of the present Application on October 6, 1997. In the "Pricing and Availability" section on page 3 of the press release, it states that the PhotoDeluxe program "is expected to be available in late August 1997".

The rejection is respectfully traversed. More specifically, the reason for traversal is based on a lack of showing or evidence by the Examiner sufficient to support a rejection under 35 U.S.C. § 102(a). According to the Federal Circuit, evidence of an actual date (e.g., an actual date of release) is needed to establish an effective date of a software product, and Adobe's August 11, 1997 press release merely indicates an expected date of availability.

In In re Epstein, 31 USPQ2d 1817 (Fed. Cir. 1994), the Federal Circuit determined that subsequent statements made in a software product abstract which refer to a prior date of release and/or installation of the product identified therein could be relied on as accurate and reliable evidence of an actual date of release of the software product. The Federal Circuit concluded that there was no reason on the face of the abstract to determine that the date specified in the abstract was inaccurate and/or unreliable. The facts relied on by the Federal Circuit in In re Epstein are not seen to be present in Adobe's August 11, 1997 press release.

Under the present circumstances, there is obvious justification present on the face of Adobe's press release itself to question the accuracy of the statements made therein. More particularly, Adobe's press release was dated August 11, 1997, which is prior to the "expected date of availability" of the PhotoDeluxe program stated in the press release, and obviously the statement occurred prior to any actual date of availability of the PhotoDeluxe program. In other words and unlike the facts in In re Epstein, the statement in Adobe's press release is merely an expectation concerning a future event, and is not a statement regarding an earlier event. Accordingly, there are obvious reasons present on the face of the press release itself to question the reliability and accuracy of the statement regarding the expected availability of the PhotoDeluxe program. The Examiner has not proffered any evidence to substantiate the accuracy and reliability of the statements made in the press release. Accordingly, it is respectfully submitted that the Examiner has not met the burden of establishing a prior date for the PhotoDeluxe program for purposes of 35 U.S.C. § 102(a).

Notwithstanding the above and for the purpose of furthering prosecution in the subject application, it is assumed herein but is in no way conceded that the date of availability of

the PhotoDeluxe program is late August 1997. Applicants submit concurrently herewith declarations of the inventors under 37 C.F.R. § 1.131 that establish a date of invention of the subject matter of the pending claims prior to August 1997.

The inventors' declarations under 37 C.F.R. §1.131 are considered to be seasonably presented as stated in MPEP § 715.09, since the declarations are submitted with this response, which is a first reply after final rejection, the grounds for which are new and are made in the final rejection.

Therefore and in view of the foregoing discussion, Claims 74 to 75, 77 to 82, 84 to 89, 91 to 96, 98 to 103 and 105 to 108 are believed to be in condition for allowance.

No other matters being raised by the Office Action, the entire application is believed to be in condition for allowance, and such action is respectfully requested at the Examiner's earliest convenience.

Applicants' undersigned attorney may be reached in our Costa Mesa, California office at (714) 540-8700. All correspondence should continue to be directed to our below-listed address.

Respectfully submitted,

  
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